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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MAURICE LAVALE DAVIS, Defendant and Appellant.	B230906 (Los Angeles County Super. Ct. No. SA070462)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Appeal dismissed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Maurice Levale Davis appeals from a judgment of conviction following his entry of a plea of nolo contendere on charges of lewd and lascivious acts upon a child under the age of 14. He entered his plea after the trial court ruled that evidence of a number of prior uncharged sexual offenses by Davis were admissible pursuant to Evidence Code section 1108 (section 1108). He asserts on appeal that the admission of such evidence was erroneous and violated his constitutional rights. We hold that Davis' appeal is not cognizable by virtue of his plea of nolo contendere, and thus we dismiss it.

PROCEDURAL AND FACTUAL BACKGROUND

Davis was charged with four counts of lewd and lascivious acts upon a child under the age of 14 (Pen. Code, § 288, subd. (a)); the first two counts were for crimes committed with respect to six-year old B.G., and the second two counts concerned acts committed upon minor S.M. when she was eight and thirteen years old. Davis was also charged with a fifth count for oral copulation/sexual penetration of B.G., a child 10 years or younger. (Pen. Code, § 288.7, subd. (b).) As to all five counts, it was alleged that Davis committed the crimes against more than one victim (Pen. Code, § 667.61, subd. (b)), that he had suffered two prior convictions for serious or violent felonies (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he had served four prior prison terms. (Pen. Code, § 667.5, subd. (b).)

Davis initially pled not guilty to all charges and denied the special allegations. The prosecution subsequently moved to dismiss count four pursuant to Penal Code section 1385, and the court granted the motion.

At the preliminary hearing, B.G. testified that she was at her grandmother's house when Davis, her uncle, carried her into his room and put her on his bed, took off her pajamas, and touched her on the buttocks and vagina. He also put his penis into her mouth. Another niece, 13-year-old S.M., testified that when she was eight years old Davis fondled her vagina while she was watching television at his apartment. She also testified that more recently Davis grabbed her buttocks as she was sweeping up tree leaves on the porch outside her grandmother's house. Several weeks later he grabbed her buttocks again as she was walking up the stairs of her grandmother's house. Both times S.M. felt that he was grabbing her in a sexual way. Defendant was held to answer on all charges.

After the prosecution disclosed its intention to introduce evidence of previous uncharged sexual offenses pursuant to section 1108, Davis moved to exclude such evidence under Evidence Code section 352, and also argued that introducing evidence of incidents that occurred when Davis was under age 14 would violate the Due Process Clause of the United States Constitution. At the same time, the prosecution made a motion to introduce evidence of Davis' previous sexual offenses pursuant to section 1108. The prosecution stated that it intended to offer evidence that Davis molested his cousin E.G. on multiple occasions when E.G. was between the ages of five or six and ages eight or nine, and Davis was between the ages of 10 and 15. The abuse included forcibly sodomizing E.G. and forcing E.G. to orally copulate and masturbate him. In addition, the prosecution intended to offer evidence that Davis sexually assaulted his biological aunt T.M. on three occasions, the first when he was 13 or 14 years old and the last when he was in his early 20's. Finally, if the prosecution could locate the alleged victim, it intended to offer evidence that Davis sexually assaulted his 17-year-old stepdaughter A.W. on three occasions.

On August 9, 2010, the court denied Davis' motion in limine to exclude the evidence of past sexual offenses and granted the prosecution's motion seeking to introduce it. After that ruling, and following the advisement and waivers of his pertinent constitutional rights and advisements concerning the consequences of a guilty plea, Davis withdrew his pleas of not guilty and pled nolo contendere to counts one and two, and also admitted the prior conviction allegations.

On February 9, 2011, before the sentencing, a *Marsden* hearing was held. Davis complained that he had entered the plea agreement believing that he was going to get 50 percent credits on his sentence, and indicated that he wanted to withdraw his guilty plea. The court stated that the law did not require that credits be discussed when a plea is taken, but invited Davis' counsel to make a motion to withdraw the plea. Instead, Davis' counsel requested that the court issue a certificate of probable cause based on the court's decision to admit the section 1108 evidence. The trial court agreed to do so.

The court then sentenced Davis pursuant to the negotiated plea agreement. Davis received a total prison sentence of 15 years: six years on count 1 (the low term of three years, doubled pursuant to Pen. Code, § 667, subds. (b)-(i), and Pen. Code, § 1170.12, subds. (a)-(d)); a consecutive four years on count 2 (one-third of the middle term); and a consecutive five-year enhancement pursuant to Penal Code section 667, subdivision (a)(1). The remaining counts and allegations were dismissed pursuant to the negotiated plea agreement.

The court executed a certificate of probable cause relating to the section 1108 ruling. In this appeal, Davis challenges that ruling.

DISCUSSION

"Subdivision (a) of [Evid. Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) However, section 1108 provides an exception to this rule in the case of a defendant charged with a sexual offense, in which event evidence of the defendant's commission of another sexual offense or offenses is admissible unless the trial court exercises its discretion under Evidence Code section 352 to exclude the evidence. (§ 1108, subd. (a).)

On appeal, Davis contends that the admission of evidence of his prior uncharged sexual offenses under section 1108 violated the Due Process Clause of the Fourteenth Amendment. In the alternative, he contends that the trial court abused its discretion in finding that the probative value of the evidence outweighed its prejudicial effect, under Evidence Code section 352. Finally, Davis contends that the court erred in admitting evidence of sexual offenses he committed when he was younger than 14 years of age without a showing by clear and convincing evidence that he knew the wrongfulness of his actions at the time. We conclude that Davis' challenges to the admission of evidence of his prior sexual offenses are not cognizable on appeal because Davis entered a plea of nolo contendere, and thus we dismiss the appeal.

Errors relating to evidentiary rulings cannot be raised on appeal following a guilty or no contest plea. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 897.) Penal Code section 1237.5 (section 1237.5) provides that generally no appeal may be

taken from a judgment of conviction on a plea of guilty or nolo contendere.[1] Issues cognizable on appeal following a plea of nolo contendere are limited to issues based on "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings resulting in the plea" (§ 1237.5, subd. (a); *In re Troy Z.* (1992) 3 Cal.4th 1170, 1180 (*Troy*)), and even then only if a certificate of probable cause is obtained. (§ 1237.5, subd. (b).) The reason for this rule is that """"a plea of guilty admits all matters essential to the conviction."""" (*Troy, supra*, 3 Cal.4th at p. 1181.) Thus, a guilty plea waives any right to raise questions regarding the admissibility of evidence. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 43 (*Thurman*); *People v. Soriano* (1992) 4 Cal.App.4th 781, 784; *People v. Turner* (1985) 171 Cal.App.3d 116, 125, cited with approval in *People v. Kelly* (2006) 40 Cal.4th 106, 122, fn. 4 ["'[A] plea of guilty waives any right to raise questions regarding the evidence, including its sufficiency or admissibility, and this is true whether or not the subsequent claim of evidentiary error is founded on constitutional violations'"].)

In this appeal, Davis challenges the admission of evidence of his prior uncharged sexual offenses on several grounds. However, by entering a plea of nolo contendere, Davis has admitted all matters essential to the conviction, including that his guilt was supported by admissible and sufficient evidence. Thus, he gave up any right to challenge the admissibility of evidence when he entered his plea, even challenges predicated on alleged constitutional violations.

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[1] Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (Pen. Code, § 1237.5.)

Davis contends, however, that the trial court's promise at the *Marsden* hearing to sign a certificate of probable cause regarding the section 1108 ruling led him to believe that the ruling would be reviewed by the Court of Appeal. Regardless, the trial court's issuance of a certificate of probable cause on the section 1108 issue did not render that issue appealable, because "[a]n issue which is not cognizable on appeal following a guilty plea cannot be made cognizable . . . by the issuance of a certificate of probable cause." (*Thurman, supra*, 157 Cal.App.4th at p. 43; see *People v. Hayton* (1979) 95 Cal.App.3d 413, 416.)

Davis contends that he would have filed a motion to withdraw his plea had the trial court not assured him that it would sign the certificate. But nothing in the record substantiates the assertion. Davis was not induced to abandon any motion to withdraw his guilty plea by the court's promise to sign a certificate of probable cause. The court invited Davis to file such a motion, based on Davis' representation that he did not understand the calculation of the credits towards his sentence. Neither Davis nor his counsel indicated he intended to file such a motion, and instead, Davis' counsel requested that the court issue the certificate of probable cause. Neither Davis nor his attorney suggested that the plea was induced in any way by the misapprehension that the section 1108 ruling could be appealed, or that Davis would not have entered the plea had he known the ruling could not be challenged following his plea. In short, Davis' appeal must be dismissed.

DISPOSITION

The appeal is dismissed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.